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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ROBERT C. COPENHAVER, Petitioner

v.

HARRIS ENTERPRISES, INC., Respondent

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the existance of a contractual arrangement between a wholesaler and a consignment gasoline dealer, whereby the dealers margin per gallon is fixed, automatically precludes the dealer from showing "fact of damage" in an action under 15 U.S.C. # 1 & 15.

INDEX

	Page
Question Presented	1
Opinion Below	3
Jurisdiction	3
Statutory Provisions involved	4
Statement of the Case	9
Reasons for granting the writ	
1. The Decision Below Conflicts with Applicable Decisions of this Court	11
2. The Decision Below Raises Significant Questions and Problems for Consignment Sellers and Suppliers.	13
Conclusion	15
Appendix	
a) opinion of the District Court	APP-1
b) opinion of the Court of Appeals	APP-4

CITATIONS

GRAY v. SHELL OIL COMPANY, 469 F.2d 742 (C.A. 9, 1972) cert. denied 412 U.S. 943 (1973)

SIMPSON v. UNION OIL OF CALIFORNIA, 311 F.2d 764 (C.A. 9, 1963)

SIMPSON v. UNION OIL OF CALIFORNIA, 377 U.S. 13. (1964)

The petitioner, Robert C. Copenhaver respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 12, 1983.

OPINION BELOW

The opinion of the Court of Appeals and the opinion of the District Court for the District of Oregon, neither of which were published, appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 12, 1983. A timely petition for rehearing en banc was denied on April 8, 1983, and this petition for certiorari was filed within 90 days of that date. This

Court's jurisdiction is invoked under 28 U.S.C. # 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 15
1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or

by both said punishments, in the discretion of the court.

United States Code, Title 15

15. Suits by persons injured Amount of recovery; prejudgment interest

(a) Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the

period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only --

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's

representative, violated any applicable rule, statute, or court order providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying litigation or increasing the cost therof.

Recovery by foreign states

(b)(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if--

(A) such foreign state would be denied, under Section 1605(a)(2) of Title 28, immunity in a case in which the action

is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

Definitions: "commerical activity"; "foreign state"

(c) For purposes of this section--

(1) the term "commercial activity" shall have the meaning given it in Section 1603(d) of Title 28, and

(2) the term "foreign state" shall have the meaning given it in Section 1603(a) of Title 28.

STATEMENT OF THE CASE

Copenhaver brought an action against Harris Enterprises, Inc., in the U.S. District Court for the District of Oregon, contending he had been damaged in his business as a result of Harris and others engaging in a retail price fixing arrangement. The action was instituted as a claim for relief under the provisions of 15 U.S.C. Sections 1 and 15. As such the suit provided a Federal Question under the law of the United States and the amount in controvery exceeded $10,000. Therefore, jurisdiction was proper in the District Court under 28 U.S.C. Section 1331.

At the time of the alleged injury Copenhaver was a consignment retailer of Harris's products, who was compensated by Harris at a fixed number of cents for each gallon of product sold.

During the process of discovery, defendant moved for summary judgment, stipulating for purposes of the motion that a price-fixing arrangement existed, but asserting Copenhaver could not, as a matter of law, show injury thereby. The District Court agreed, finding that because Copenhaver's compensation was independent of the pump price, that Copenhaver could not have been injured by price fixing.

The judgment of the District Court was affirmed by the Court of Appeals, citing its decision in Gray v. Shell Oil Co., 469 F.2d 742 (C.A.9, 1972) cert. denied 412 U.S. 943 (1973).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The Ninth Circuit, with its decision in this case, appears to have come full circle to the position it asserted in Simpson v. Union Oil of California, 311 F.2d 764 (CA9 1963), prior to this Court's opinion in the subsequent writ of certiorari proceeding in that case, Simpson v. Union Oil of California, 377 U.S. 13 (1964). The Ninth Circuit held in Simpson that because the dealer acquiesed in the consignment price-fixing arrangement, his damage if any was the result of his own action and thus could not support the damage element of an antitrust claim. 311 F.2d 764, 769. This Court reversed, holding that "re-sale price maintenance through the present,

coercive type of "consignment" agreement is illegal under the antitrust laws, and that petitioner suffered actionable wrong or damage." 377 U.S. 13 at 24. This Court remanded for hearing on what damages were suffered.

Subsequently, the Ninth Circuit decided Gray v. Shell Oil Company, 469 F.2d 742 (1972). In Gray, the Court denied the plaintiff dealers recovery, however not because Gray as a matter of law could not show damage as a result of his consignment agreement, but because, after trial and an opportunity to present evidence, Gray did not present such evidence sufficient to show damage.

In the present case, the Ninth Circuit relys on Gray to affirm the District Courts holding that petitioner could not, because of his agreement, show damage. This is both a misapplication

of the holding in Gray, and ignores the teaching of this Court in Simpson.

This action arose on summary judgment, while discovery was far from completed, on defendant's assertion that the agreement in this case made it impossible as a matter of law for Copenhaver to show damage. The motion was briefed and argued on that point. Plaintiff was not obligated to produce his as yet incomplete evidence as to amount of damage, as that was not at issue in the motion.

2. THE DECISION BELOW RAISES SIGNIFICANT QUESTIONS AND PROBLEMS FOR CONSIGNMENT SELLERS AND SUPPLIERS.

As was recognized by this Court in Simpson, consignment sales arrangements form a significant component of trade and commerce, and are employed in a great many industries, not the least of which is the

business of petroleum retailing. This Court found that to allow companies to achieve price-fixing through the consignment device would in effect be to make legality for antitrust purposes turn on clever draftsmanship. 377 U.S. 13 at 24.

Should the Ninth Circuit's decision in this case be allowed to stand, it will deprive a significant segment of American business people of their private antitrust action remedy, merely because they are parties to consignment agreements, and will frustrate the purpose of Congress in providing for such a remedy in the legislation.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully Submitted,

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APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

ROBERT C. COPENHAVER, Plaintiff, vs. HARRIS ENTERPRISES, INC., Defendants.	)	Civil No. 80-639
	)	ORDER
	)	ENTERED: MAY 14, 1981

Plaintiff brought this antitrust action against defendant alleging that defendant illegally conspired to restrain trade and to set the retail price of gasoline and that said conspiracy caused him to sustain a loss of profits totalling $250,000. Defendant has moved for summary judgment on the ground that plaintiff cannot prove that he suffered any damages even if he can prove an antitrust violation.

Plaintiff operated a retail gas station pursuant to lease and consignment agreements with the defendant. The uncontested facts are that plaintiff sold petroleum products to the public on consignment at prices established by the defendant. In consideration for such sales, plaintiff was paid a fixed amount based upon the volume of products sold. For example, in 1980 he received .0412 dollar per gallon of gasoline sold. Defendant's compensation was not dependent upon the retail price of the gasoline set by plaintiff. (1)

Under this arrangement, plaintiff's compensation was independent of the pump price of the gasoline(2), and therefore any illegal price fixing by defendant could not have caused the profit losses alleged by plaintiff.

IT IS ORDERED that defendant's motion for summary judgment is granted.

DATED this 13th day of May, 1981.

Judge Helen J. Frye
District Court Judge

FOOTNOTES

(1) The representations of plaintiff's counsel during oral argument that this really was not the case is not sufficient to raise a genuine issue of fact and thereby avoid summary judgment. Fed. R. Civ. P. 56(c).

(2) It is clear from plaintiff's deposition testimony that, if he had had control of the pump price, he would have raised the price per gallon of gasoline. Therefore, this is not a case where plaintiff is contending that, absent defendant's alleged price fixing, he could have lowered the pump price, sold more gasoline, and thereby increased his volume-dependent compensation from defendant.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT C. COPENHAVER, Plaintiff-Appellant, vs. HARRIS ENTERPRISES, INC., Defendant-Appellee.	) CA No. 81-3636) DC No. Civ. 80-639) MEMORANDUM) ENTERED: JAN. 12, 1983

Appeal from the United States District Court For the District of Oregon
Honorable Helen J. Frye, District Judge, Presiding
Argued and Submitted December 9, 1982

BEFORE: GOODWIN, PREGERSON & CANBY, Circuit Judges

Copenhaver appeals from a summary judgment dismissing his claim and awarding judgment against him on defendant's counterclaim for breach of contract. We affirm.

To establish a claim for price fixing in violation of the antitrust laws, Copenhaver must show that he was damaged. While requirements of proof may be relaxed

in establishing the amount of damages, the fact of injury must be established by concrete evidence. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 490 (1977); William Inglis & Sons Baking Co. v. ITT Continental Baking Co. Inc., 668 F.2d 1014, 1051 (9th Cir. 1982). Because Copenhaver's commission of 4 cents per gallon did not vary with the retail price of gasoline sold under the consignment arrangement with defendant, the alleged fixing of the retail price at a figure lower than Copenhaver desired cannot have harmed him under his existing contract. Gray v. Shell Oil Co., 469 F.2D 742, 748 (9TH Cir. 1972), cert. denied, 412 U.S. 943 (1973). Nor has Copenhaver offered any evidence or pointed to any discoverable material that might substantiate a claim that profits would

have increased if he had raised both the retail price and his share per gallon. Id.; see Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573, 580 (3d Cir. 1979).

While summary judgment is not favored in antitrust cases where motive or intent are at issue, Poller v. Columbia Broadcasting System, 368 U.S. 464, 473 (1962), this court has approved its proper use in appropriate cases. See Coca-Cola Co. v. Overland, Inc., No. 80-4376 (9th Cir. Nov. 18, 1982); Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc., 637 F.2d 1376, 1381 (9th Cir.), cert. denied, 454 U.S. 831 (1981); Mutual Fund Investors, Inc. v. Putnum Management Co., 553 F.2d 620, 622 (9th Cir. 1977). Because Copenhaver has made no showing of injury, his antitrust claim was properly dismissed.

Copenhaver did not file a timely reply to defendant's counterclaim, nor any motion to permit late filing. He therefore admitted the factual matter alleged in the counterclaim. Fed. R. Civ. Proc. 8(d); 5 C. Wright & A. Miller, Federal Practice & Procedure # 1279. His failure to plead in timely fashion his defense of illegality in response to the counterclaim waived that defense. Fed. R. Civ. Proc. 8(c); Henry v. First Nat'l Bank of Clarksdale, 595 F.2d 291, 298 n.1 (5th Cir.), cert. denied, 444 U.S. 1074 (1979); see Santos v. Alaska Bar Ass'n, 618 F.2d 575, 576-77 (9th Cir. 1980). Copenhaver has presented no reasons justifying relief from the consequences of that waiver. The summary judgment for defendant on the counterclaim was therefore proper.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT C. COPENHAVER,	)	
	)	NO. CA 81-3636
Plaintiff-Appellantt,)		DC. Civ. 80-639
	)	
vs.	)	ORDER
	)	
HARRIS ENTERPRISES, INC.,	)	ENTERED:
	)	APR. 8, 1983
Defendant-Appellee.	)	

BEFORE: GOODWIN, PREGERSON and CANBY, Circuit Judges

A majority of the panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.